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No. 80-1377

In the Supreme Court of the United States

OCTOBER TERM, 1980

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. The simple thrust and narrow dimensions of petitioners' position must not be lost in the welter of arguments surrounding it:

a. Whether or not nuclear weapons are stored at any specific site is a military secret. The Atomic Energy Act of 1946, as amended, requires that information which relates primarily to the military utilization of atomic weapons be "safeguarded as defense information" (42 U.S.C. 2162(d));

b. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332 *et seq.*, does not require the disclosure of military secrets. First, NEPA, 42 U.S.C. 4332(2)(C), declares (through its incorporation by reference of the Freedom of Information Act, 5 U.S.C. 552(b)(1)(A)), that the public dissemination of an environmental impact document is not required where it involves matters which must

be "kept secret in the interest of national defense or foreign policy * * *." Second, "NEPA was not intended to repeal by implication any other statute," and "where a clear and unavoidable conflict in statutory authority exists, NEPA must give way," *Flint Ridge Development Co.* v. *Scenic Rivers Association*, 426 U.S. 776, 788 (1976);

c. Since public knowledge that an environmental impact document had been, or was intended to be, prepared for the storage of nuclear weapons at any specific site would necessarily reveal the military secret that nuclear weapons are, or are planned to be, stored at that site, there may be no public disclosure of compliance (or even noncompliance) with NEPA with respect to the storage of nuclear weapons at any specific site; and

d. Whether nuclear weapons are stored at West Loch cannot be revealed. If they are stored there, however, an appropriate environmental impact document has been prepared, as required by NEPA and Department of Defense regulations.

2. Respondents contend (at 14 and 15 of their brief) that the Atomic Energy Act is not involved in this case, since the pertinent secret data are not Restricted Data, but are now Formerly Restricted Data. Formerly Restricted Data are defined by the Atomic Energy Act as "such data as the Commission and the Department of Defense jointly determine relates primarily to the military utilization of atomic weapons and which the Commission and Department of Defense jointly determine can be adequately safeguarded as defense information." 42 U.S.C. 2162(d). Data are designated as Formerly Restricted not to divest the Atomic Energy Commission of its jurisdiction over information relating primarily to the military utilization of atomic weapons, but to confer upon the Department of Defense responsibilities equal to those of the Commission with respect to the protection of such data. See 42 U.S.C.

2162(c). There is no reason to suppose, therefore, that Restricted Data relating to the military utilization of atomic weapons are less protected than Restricted Data having no military application.

Moreover, the Atomic Energy Act expressly states that "no such data so removed from the Restricted Data category [i.e., Formerly Restricted Data] shall be transmitted or otherwise made available to any nation or regional defense organization, *while such data remains defense information* [emphasis supplied], except pursuant to an agreement for co-operation entered into in accordance with section 2164(b) of this title." 42 U.S.C. 2162(d). Formerly Restricted Data, therefore, so *long as they remain defense information—i.e.*, until the Atomic Energy Commission and the Department of Defense *jointly determine* that they may be published without "unreasonable risk to the common defense and security" (42 U.S.C. 2162(c))—can only under certain conditions be made available to our allies. Obviously, the limitation on the disclosure of Formerly Restricted Data to allied nations, to be meaningful, must necessarily embrace a similar limitation on the disclosure of Formerly Restricted Data to anyone with the standing to bring a NEPA suit.[1] Thus, contrary to the assertion of the respondents, Formerly Restricted Data remain within the purview and protection of the Atomic Energy Act.

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[1] As explained by Mr. Murray L. Nash, Deputy Director, Office of Classification, Department of Energy (J.A. 27):

> Formerly restricted data is a rather oddball name. It refers to restricted data which the Department of Energy, formerly the Atomic Energy Commission and the Department of Defense have both jointly determined can be adequately protected as national security information when that information is in the United States. But it reverts to the former restricted data categorization if it is transferred outside the United States, say to NATO or in a national organization that we deal with. But it is really restricted data.

3. Respondents contend (at 13 and 14 of their brief) that neither the Atomic Energy Act nor any other statute prohibits the *preparation* of an an appropriate environmental impact document, and that even if that document must be kept entirely classified, NEPA requires that it be prepared (Resp. Br. 25). On these points, there is no dispute: in our initial brief (at 12 and 13), we cite Department of Defense regulations requiring compliance with NEPA for classified activities,[2] and acknowledge that the "statute compels *decisionmakers* to take specified steps to inform themselves of, and take into account, the environmental consequences of the actions they propose."

The requirement that an environmental impact document be *prepared* for a secret activity does not mean, however, that the existence of the document may be disclosed, or its contents disseminated. An EIS (or Environment Impact Assessment) about a secret activity necessarily is at

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[2]The regulation cited in our opening brief (at 12-13), 32 C.F.R. 214.8(i) (1978), was in effect at all times relevant to this case. We should note, however, that this part of the Code of Federal Regulations was substantially amended on July 30, 1979, 44 Fed. Reg. 46841 and a regulation of that number, and with the same text, no longer exists. The rule nevertheless remains the same. Indeed, the amended regulations clearly follow the principle that an EIS must be prepared for *all* actions significantly affecting the quality of the human environment (para. B.5 of DOD Implementing Procedures, as set forth in 32 C.F.R. 214.6), and that an environmental impact assessment (EIA) must be prepared unless it is clear, at the outset, that no such impact is involved (*id.* at paras. B.4, B.6, C.1-3). That the obligation to consider environmental factors and prepare an appropriate document applies regardless of the classified nature of the action or information, is made clear by the provisions dispensing with public participation when that is not "practicable" because of "national security classification issues" (*id.* at para. C.3) and exempting "classified environmental documents" from the requirements for "circulation" and "public involvement", except when segregation of unclassified materials is "feasible"—a procedure "normally * * * not possible when the proposal itself is classified" (*id.* at para. D.10).

least as secret as the activity itself. In *Totten* v. *United States*, 92 U.S. 105, 107 (1875), this Court went so far as to hold that since a lawsuit with respect to a secret contract would "inevitably lead to the disclosure of matters which the law itself regards as confidential," the suit itself may not be maintained.[3] Similarly here, since public participation in the NEPA process would inevitably lead to the disclosure of matters which the Atomic Energy Act (as well as the common law—see 8 J. Wigmore, *Evidence* § 2378 (McNaughton rev. ed. 1961)) requires to be kept confidential, such participation may not be permitted.

The respondents suggest that this difficulty can be overcome by disclosing something less than the entire EIS or other environmental document. They state (at 23 of their brief) that there can be an "open examination of * * * *unclassified matters*" (emphasis supplied) as a result of which members of the public will have "the basic information they need to make critical decisions concerning their own safety and security and to be an informed electorate." An example of such a decision (set forth at Resp. Br. 23, 24) is that "persons who are now living in or contemplating moving to the fast growing Pearl Harbor area, where West Loch is located, might wish to reconsider these plans if an EIS determined that there was a significant probability of an airplane crashing into one of West Loch's nuclear capable bunkers."

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[3]The Court of Claims has recently dismissed two cases on the basis of the *Totten* decision: *Simrick* v. *United States*, petition dismissed, No. 45-80C (June 27, 1980), and *Mackowski* v. *United States*, petition dismissed, No. 605-80C (June 12, 1981). The orders dismissing the cases are not yet reported, but a copy of each order is attached hereto.

But what the respondents do not explain is how the members of the public would be aided in making such decisions[4] by an EIS or EIA which does not—which cannot, if it contains only unclassified matters—disclose whether or not nuclear weapons are being stored at West Loch. And respondents' many arguments, in spite of their occasional deference to the concept of an EIS containing only unclassified matter, are meaningful only if seen to be premised upon the assumption that the EIS they are seeking will definitely reveal whether or not nuclear weapons are being stored at West Loch (see Resp. Br. 22, 23, 26, 28 and 30 n.22). Yet this, of course, is the very *essence* of the supposed military secret. The bare fact that nuclear weapons are stored at diverse places in the United States obviously is no secret to anyone: *where* those weapons are being stored, however, is a secret; it is the secret here sought to be protected, and the secret which necessarily would be disclosed if the appellants prevail.[5]

4. Respondents reply (at 18 of their brief) that since the Department of Defense has admitted that the West Loch facility is capable of storing nuclear weapons, an EIS relating to that storage "would not reveal any information not already public and could not injure national security."

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[4]Moreover, it cannot be ignored that many of the members of the public living in the Pearl Harbor area are there because of, not in spite of, the military installations.

[5]To be sure, examples can be cited where EIS's have been prepared for defense activities only a few elements of which were secret, and where it was possible to separate the secret from the non-secret aspects of the operation. But that is not possible here, where merely to identify the location where nuclear weapons are being stored is to reveal the secret.

However, the admission that a military base is "nuclear capable" is essentially an admission of nothing, since common sense informs the world at large that every fenced military installation might be a place where weapons, nuclear or otherwise, are being stored. To say that a specific installation is capable of storing nuclear weapons is no more informative, and no more indicative of an intention to use the facility for weapon storage purposes, than to say that any particular piece of land is capable of having an eight-lane highway constructed over it; there remains the question whether the appropriate authorities intend to build such a highway. No one would think of requiring the federal government to prepare EIS's for all the highways in the country which are capable of being constructed, but which no one has any intention to build; similarly, the government ought not be required to prepare EIS's for all the facilities in the United States which are capable of storing nuclear weapons, but where no one has any intention of storing them. In *Kleppe* v. *Sierra Club*, 427 U.S. 390, 401, 402-403 (n.14) (1976), addressing a similar contention that an EIS should be prepared for a federal activity not being contemplated, this Court held that NEPA "requires an impact statement only in the event of a proposed action * * *," pointing out that it is only with respect to a specific proposed action (which in this case would mean the storage of a specific quantity of nuclear weapons having specific operating mechanisms and specific capabilities) that "the bounds of the analysis are defined * * *."

The government ought not be compelled to prepare an EIS for hundreds of facilities where the storage of nuclear weapons is not contemplated—a burden not imposed by law and misleading to the public. Nor should it be driven to that expedient in order to preserve, from domestic terrorists and hostile foreign powers alike, the secret as to where the

weapons are actually stored.[6] In sum NEPA does not require the preparation of EIS's for activities which are *not* being contemplated, and the Atomic Energy Act does not permit public participation in the preparation of EIS's relating to secret activities (within the purview of the Act, of course) which *are* being contemplated.

5. Respondents throughout their brief make a number of supposedly factual statements, the truth of which they cannot possibly know. Thus, they state that the petitioners have failed to consider certain questions "essential to any decision to store nuclear weapons at West Loch" (Resp. Br. 5) and that petitioners "have never prepared an Environmental Impact Statement (EIS) which would examine, among other things, the likelihood of an airplane crashing into the storage bunkers and the resulting injury to people and damage to the environment if such an accident did occur" (*id.* at 6, 28). Since government officials have never indicated whether or not nuclear weapons are stored at West Loch—and thus have necessarily been silent on the question whether an EIS was prepared prior to the storage of any nuclear weapons at West Loch (if in fact any are stored

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[6]This is why the "hypothetical EIS" directed to be prepared by the court of appeals is not a solution to the problem of reconciling the secrecy requirements of the Atomic Energy Act with the public disclosure provisions of NEPA, for, obviously, the preparation even of hypothetical EIS's only for those facilities where the storage of nuclear weapons is under serious consideration would facilitate the ascertainment by interested persons of the location of storage sites.

Already, on the basis of the court of appeals' decision in the instant case, a suit has been filed in the district court for the Central District of California, to enjoin officials of the Defense Department from "transporting, importing, maintaining, storing and handling nuclear weapons at the Seal Beach Naval Weapons Station until they have complied with the requirement of the National Environmental Policy Act * * *." *Laine* v. *Weinberger*, No. 81-3969 (filed Aug. 6, 1981).

there)—there simply is no basis in the record of any of the foregoing statements.

Respondents also persist in the allegation (at 10 of their brief) that "[b]ecause of the proximity of the West Loch storage facility to the Honolulu, International Airport, a frighteningly real possibility exists of an airplane crashing into the bunkers on any one of the hundreds of takeoffs and landings which occur there every day."

The district court found that the West Loch storage facility is "approximately one mile from the landing flight path" for the airport, and that "the Federal Aviation Administration has not established a prohibited flight zone over this area" (Pet. App. 13a). The respondents' emphasis on the spectre of an airplane crash into West Loch demonstrates the virtually unlimited extent of possibilities into which the creative mind may suggest that an environmental statement must inquire. The one mile distance means that aircraft come about as close to West Loch as aircraft using National Airport come to the Supreme Court Building.

Moreover, this concern, and the others raised by respondents, relate to safety. Yet the federal action at issue here is not the creation of new weapons storage where none existed previously. It is the transfer of weapons storage from one site to another, and the Environmental Impact Assessment found that safety considerations were among those that "offset the adverse environmental effects" (Pet. App. 26a).

6. A contention made, not by respondents, but by the Fellowship of Reconciliation and other amici in support of the respondents, is that what the government claims to be a military secret is in fact generally well-known, both to the American public and to potential enemies, and that there is accordingly no reason not to prepare and publish an EIS (at 27 through 43 of the amicus brief). Appended to the amicus brief (at 1a) is an excerpt from Publication No. 7 of

National Action/Research on the Military Industrial Complex, showing on a map of the United States the location of 121 alleged "Nuclear Weapons Storage and Development Sites."

It may well be that many or most of the installations identified are *capable* of storing nuclear weapons; it does not follow that such storage is a present fact or now planned. Moreover, even if some secrets are out of the bag, that is no reason to empty the bag entirely, for all to see.

In any event, as the excerpt submitted by the amici expressly acknowledges (Fellowship of Reconciliation Amici Br. App. at 2a),

> U.S. military policy prohibits either confirming or denying the presence of nuclear weapons. The shroud of secrecy surrounding the testing, production and storage of nuclear weapons makes it difficult to verify the location of all sites.

Thus, the very materials submitted by the amici show that the military's "shroud of secrecy" has some effect in safeguarding the country's military secrets. It cannot be supposed that NEPA was designed to permit the revelation of those secrets, and that Congress with one hand is piercing that which with the other hand it shields.

7. Respondents contend (at 15 and 16 of their brief) that information which is classified pursuant to Exec. Order No. 12065, 43 Fed. Reg. 28949 (1978), can be declassified and placed in public portions of an EIS. This is true,[7] but irrelevant; the Department of Defense has seen fit not to declassify information with respect to the location of storage sites for nuclear weapons.

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[7]Strictly speaking, the secret information in this case, being Formerly Restricted Data, is not protected *only* by Exec. Order No. 12065 (see pages 2 and 3, *supra*). Formerly Restricted Data remain subject to the provisions of the Atomic Energy Act, and can be published only upon a

This brings us, then, to what this suit is essentially about: whether it shall be government officials acting pursuant to congressional legislation, or environmentally concerned citizens, who shall make the final determination as to what information may, or may not, upon disclosure, jeopardize the national defense. For although "in some cases, * * * the need to protect such information may be outweighed by the public interest in disclosure of the information" (Resp. Br. 17), it is equally true that "even the most compelling necessity cannot overcome the claim of privilege [from disclosing military secrets] if the court is ultimately satisfied that military secrets are at stake." *United States* v. *Reynolds*, 345 U.S. 1, 11 (1953). Here, there can be no question that military secrets are at stake; information with respect to the military utilization of nuclear weapons has been statutorily defined as information which is to be kept secret and accorded all of the protection which our laws allow.

This case is an attempt to force the public disclosure of information concerning the storage of nuclear weapons at West Loch. Since the storage or non-storage of nuclear weapons at any particular site is a military secret, the attempt to obtain that information creates a tension between the general disclosure policy of NEPA and the secrecy policy of the Atomic Energy Act. As explained above, both Congress and this Court have made it clear that any such tension is to be resolved in favor of secrecy.

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determination by the Atomic Energy Commission and the Department of Defense that such publication does not constitute an unreasonable risk to the common defense and security. 42 U.S.C. 2162(c). We assume, however, that the respondents would argue that these agencies, or the President, should declassify the material, whatever might be the authority for that declassification, and thus we do not make a point of this in the context of the instant argument.

Whether there are, as respondents and amici suggest, additional finite pieces of information that could be safely disclosed is beside the point. The general subject concerning which the respondents seek more ample public knowledge—the storage of nuclear weapons at a specific site—is one which Congress has determined should remain within the realm of the secret. This Court's decisions in *Reynolds* and *Totten* provide a margin of safety for the protection of government secrets. Indeed, *Totten* appears to stand for the proposition that courts should not even entertain lawsuits which have the potential of inquiring into general areas involving government secrets.

Fortunately, however, this case need not be resolved on the basis of a general *Totten*-type protection. The NEPA issue in this case is this simple: If there is no nuclear storage at West Loch, then the fears posited by the respondents are groundless. If, on the other hand, West Loch is, or is to be a nuclear storage facility, then consistent with Defense Department regulations, the environmental consequences have been brought to the decision makers' attention, and taken into account by them. NEPA requires no more. Thus, the only possible missing element is disclosure to the general public. And that is the very kind of disclosure that is prohibited by NEPA, by the Atomic Energy Act, and by this Court's decisions.

In the final analysis, the respondents ask for little more, and the difference between their position and that of petitioners would appear to be a narrow one. The respondents assume that the action of storing nuclear weapons necessarily requires the preparation of an EIS (as, indeed, the district court held (Conclusion of Law No. 4, App. D, Pet. App. 14a)), and argue that "[e]ven if the West Loch EIS had to be kept entirely classified, NEPA requires that the EIS be prepared and taken into account in making any decision to store nuclear weapons at West Loch" (Resp. Br. 25). To the

extent that a full-blown EIS might be required in any given case, we accept this proposition. However, NEPA does not compel the preparation of an EIS for *every* federal action. The regulations of the Council on Environmental Quality recognize that, in appropriate situations, documents other than environmental impact statements may be prepared, and that their preparation fully satisfies the requirements of NEPA. 40 C.F.R. 1501.3, 1508.9. Thus, while we do not agree with the respondents (or with the courts below) that an environmental impact statement is the only type of document which can satisfy the requirements of NEPA in a case involving the storage of nuclear weapons, we do agree that an appropriate document—be it an environmental assessment or an environmental impact statement—must and will be prepared for the use of those within the Department of Defense who make decisions relating to the storage of nuclear weapons. The disagreement we have with the respondents is whether we must *reveal* that an appropriate document has been prepared with respect to the storage of nuclear weapons at West Loch and *disclose* the document to the public.

There are occasions when the broader public interest in secrecy must prevail over the interest in full public information concerning what government is doing. This is such a case. As Viscount Simon wrote in *Duncan* v. *Cammel Laird & Co., Ltd.* [1942] A.C. 624; [1942] All E.R. 587, 595-596, H.L., in a decision upholding the British government's refusal to disclose certain secret information:

> After all, the public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private citizen may seem to be denied what is to his immediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our opening brief, the judgment of the court of appeals should be reversed, with a direction to dismiss the complaint.

Respectfully submitted.

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DOJ-1981-10

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 45-80C

FILED
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COURT OF CLAIMS

A.H. Simrick

v.

The United States

Contraction alleged agreement with CIA for undercover activities; *Totten* v. *United States*, 92 U.S. 105.

JUN 27 1980

John D. Sims, attorney of record. *Dameron & Sims*, of counsel.

Ellen J. Sazzman, with whom was *Assistant Attorney General Alice Daniel*, for defendant.

Before DAVIS, *Judge*, Presiding, KUNZIG and BENNETT, *Judges*.

ORDER

The petition of plaintiff A.H. Simrick alleges that, from 1969 through 1976, he entered into a contract with the Government (acting through the Department of State and the Central Intelligency Agency) providing that (a) defendant was to pay plaintiff an initial retainer of $5,000; (b) defendant was to pay plaintiff $20,000 per year as salary; (c) plaintiff was to set up a business in Mauritius to act as a

"cover" for agents of the CIA and to provide information; (d) plaintiff was to provide defendant with field offices with identification badges; (e) plaintiff was to provide a meeting place for the CIA in Mauritius; (f) defendant was to buy all the output of plaintiff's business produced in Mauritius at the fair matket rate and was to wholly support plaintiff's company in Mauritius; and (g) defendant was to pay all moving and resettling costs of plaintiff. The petition then alleges that (i) plaintiff carried out his agreement and formed two companies, Le Baron and Le Sega, to produce, manufacture and sell ties; (ii) defendant has refused to pay plaintiff anything more than $9,300, the bulk of which was received in 1978; and (iii) plaintiff is due $219,000 (plus costs and interest), "including loans the Plaintiff was forced to procure to keep the company in operation as a result of the Defendant's failure to purchase the output of the Plaintiff and to support the company."

Defendant has moved to dismiss the petition, mainly on the authority of *Totten* v. *United States*, 92 U.S. 105 (1875). In that more-than-a-century-old decision coming from this court, the Supreme Court assumed that the plaintiff's decedent had a contract with President Lincoln (made in July 1861) by which the decedent "was to proceed South and ascertain the number of troops stationed at different points in the insurrectionary States, procure plans of forts and fortifications, and gain such other information as might be beneficial to the government of the United States, and to report the facts to the President; for which services he was to be paid $200 a month." It was also assumed that in fact the decedent was only reimbursed his expenses. The Supreme Court had no difficulty with the President's authority to make such a contract, but it held that nevertheless the claimant could not enforce the contract in the Court of Claims. "The service stipulated by the contract was a secret

service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent. If upon contracts of such a nature an action against the government could be maintained in the Court of Claims, whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed to the serious detriment of the public. * * * The secrecy which such contracts impose precludes any action for their enforcement. * * *." 92 U.S. at 106-107.

Defendant says that plaintiff's case falls squarely under *Totten*, that inquiry into the case would necessarily involve the precise nature of the alleged contractual understandings between the parties, including the parties' alleged responsibilities under the contract, a detailed description of the duties plaintiff may have actually performed, and a description of any action defendant may have taken pursuant to the contract. It is also said that plaintiff "would have to detail any dealings he may have had with particular officers of the CIA with respect to the formation of the alleged contract and the performance of duties pursuant to the contract, even though many of those CIA employees might work under cover."

Plaintiff's response is that *Totten* involved a direct spy, while plaintiff acted more as an administrative employee of the CIA, sent to set up a business, run the intelligence gatherers through his business as a front opertaion, and manufacture ties to be sent back to the United States and sold by the domestic corporations. We are told that plaintiff's information gathering role was insignificant compared to his administrative functions as a corporate businessman; and that his suit is for acting as a corporate businessman, setting up two corporations, providing employment roles and meeting places, and providing day-to-day information on the political climate in Mauritius. We are also told that very little of a secret nature is left in the case, and what there is can be disclosed *in camera* in the court's discretion.

On what we now have before us, we have to say that plaintiff's case falls under *Totten*. This is not a suit between private parties. The contract, if there was one, was with the United States; according to plaintiff he was to engage significantly in undercover intelligence work for the Government; his alleged dealings seem to have been oral and very probably with CIA operatives not otherwise known to the public. We doubt very much that plaintiff could make his case, or the defendant put up its defense, without revealing secret matters which should not be disclosed. In the words of *Totten*, both plaintiff and the Government "must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment * * *."92 U.S. at 106. The agents in such a secret service "must look for their compensation to the contingent fund of the department employing them, and to such allowances from it as those who dispense that fund may award. The secrecy which those contracts impose precludes any action for their enforcement." 92 U.S. at 107. Those holdings all seem to apply here. They have been

summarily reaffirmed in *United States* v. *Reynolds*, 345 U.S. 1, 11 n.26 (1953).

IT IS THEREFORE ORDERED, without oral argument, that defendant's motion to dismiss is granted and the petition is dismissed.

JUN 12 1981

BY THE COURT

Oscar H. Davis
Judge, Presiding

IN THE UNITED STATES COURT OF CLAIMS

No. 605-80C

FILED
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COURT OF CLAIMS

Carmen Mackowski

v.

The United States

Contracts; alleged agreement with CIA for espionage activities; lack of waiver of privilege.

JUN 12 1981

Willaim Z. Shulman, attorney of record, for plaintiff. *Greenberg and Feiner*, of counsel.

Kathleen A. Flynn, with whom was *Acting Assistant Attorney General Thomas S. Martin*, for defendant. *E. Page Moffett*, Central Intelligence Agency, of counsel.

Before NICHOLS, *Judge*, Presiding, KASHIWA and SIMTH, *Judges*.

ORDER

This case is before us on defendant's motion to dismiss plaintiff's petition. We agree with defendant and thus dismiss the petition.

Plaintiff alleges she was an employee of the Central Intelligence Agency (CIA), hired to perform espionage activities in Cuba. Her contract of employment allegedly commenced in December 1964 and ceased when she was released from a

Cuban prison in 1977. Plaintiff further alleges the defendant paid some of the money owed her but has refused to pay the balance she claims is owed: expenses, related costs, medical bills, and various disability, social security and other compensation benefits.

Defendant's motion to dismiss is premised on *Totten* v. *United States,* 92 U.S. 105 (1875), and our order in *Simrick* v. *United States,* Ct. Cl. No. 45-80C (order entered June 27, 1980).

Totten is very similar to our case, involving the beneficiaries of an estate who sued the United States for money allegedly owed the decedent as a result of espionage work performed during the Civil War. The Supreme Court assumed the decedent had a contract with President Lincoln to "proceed South and ascertain the number of troops stationed at different points in the insurrectionary States, procure plans of forts and fortifications, and gain such other information as might be beneficial to the government of the United States * * * for which services he was to be paid $200 a month." 92 U.S. at 105-106.

The Supreme Court held that such a claimant could not enforce his contract in the Court of Claims:

> The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a

> disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent. If upon contracts of such a nature an action against the government could be maintained in the Court of Claims, whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public. A secret service, with liability to publicity in this way, would be impossible; and, as such services are sometimes indispensable to the government, its agents in those services must look for their compensation to the contingent fund of the department employing them, and to such allowance from it as those who dispense that fund may award. The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery. [*Id.* at 106-107.]

Simrick applied the holding of *Totten* to a supposed agent of the CIA who alleged *Totten,* which involved a direct spy, was inapplicable to himself, a more or less administrative employee. This court rejected that analysis on the ground that the assertion and defense of such a case would reveal secret matters which should not be disclosed. Relying then on *Totten,* we held the secrecy imposed by such espionage-type contracts precludes any action for their enforcement.

Plaintiff here does not even mention the *Simrick* order. Instead, plaintiff alleges that under *United States* v. *Reynolds,* 345 U.S. 1 (1953), *Totten* is no longer the law. The panel in *Simrick,* however, disagrees with plaintiff; it held the *Totten* holding was summarily reaffirmed in *United*

States v. *Reynolds*, 345 U.S. at 11 n.26. Order at 4. Thus, we reject that argument of plaintiff's.

Plaintiff also asserts that the defendant waived a *Totten*-type defense. While plaintiff was released from the Cuban prison due to the efforts of then Senator Frank Church, such action cannot be construed as a public confirmation or publication that plaintiff performed espionage services for the United States. Cf. *United States* v. *Marchetti*, 466 F. 2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972) (rumor and speculation are not the equivalent of public disclosure; and the presence of that kind of surmise is no reason for avoidance of constraints on publication). Nor can defendant's assertion before the district court that such court lacked jurisdiction under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.* (1976), because plaintiff failed to file an administrative claim, as required by 28 U.S.C. § 2675, constitute a public admission of plaintiff's allegations.

In short, this case is controlled by *Totten* and *Simrick*. We are satisfied that the defendant has properly invoked this privilege. Because of the nature of the parties' alleged agreement, it is obvious the claim could not be prosecuted or defended without revealing secret matters which should not be disclosed. Hence, "the secrecy which [the alleged contract] impose[s] precludes any action for [its] enforcement." *Totten*, 92 U.S. at 107. Cf. *Snepp* v. *United States*, 444 U.S. 507 (1980) (*per curiam*) (highlighting the importance of confidentiality with respect to intelligence gathering).

IT IS THEREFORE ORDERED, without oral argument, that defendant's motion to dismiss is granted and the petition is dismissed.

JUN 12 1980

BY THE COURT

Shiro Kashiwa
Judge